87-2078

JUN 16 1988

JOSEPH F. SPANIOL, JR.

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

GORDON PANTER, JIM MALLORY, LEO VINCENT, J. J. EDRINGTON, JOE TEDESCUCCI, R. L. FRENCH, JOHN W. VOGT, TILFORD WAGERS, JIM BURNS, KENNETH PEARL - - - - - Petitioners

versus

AMERICAN SYNTHETIC RUBBER CORPORATION, and

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, Local 423 and

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, International Union AFL-VIO - - - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether Union leadership should be held responsible to membership for Union leadership's interpretation of the Union Constitution to that membership when such interpretation later works against said members and to the benefit of said leadership to keep said members from voting on a contract or speaking at the meeting where the Union voted on a contract which eliminated the seniority and recall rights of said members while retaining the recal rights of the members who were allowed to speak and vote at the Union meeting.

2. What are the responsibilities of Labor and Management in the negotiation of an agreement with regard to the protection of minority employees? While Petitioners admit that the company and the Union have the right to negotiate a clause which works to the detriment of minority employees, this case presents a question of whether the company and Union can negotiate two clauses, one for minority employees and one for majority employees.

3. May the company and the Union negotiate a contract eliminating the seniority and recall rights of employees who are not allowed to vote on that contract and then further restrict or limit their earned severance pay by placing limitations on the employee's rights to collect that severance pay.

PARTIES

The Parties herein:

Gordon Panter
J. J. Edrington
John Vogt
Tilford Wagers
R. L. French
Leo Vincent
James Mallory
Joseph Tedescucci
Thomas Pearl
James Burns ..... Plaintiffs

American Synthetic Rubber Corporation

United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 423

United Rubber, Cork, Linoleum and Plastic Workers of America, International Union AFL-CIO, CLC ..... Defendants

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IN THE

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v.

AMERICAN SYNTHETIC RUBBER CORPORATION, and
UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, Local Union 423 and
UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA International Union AFL-CIO, CLC - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is unreported and is reproduced in the Appendix hereto. The decisions of the District Court are unreported and are included in the Appendix herein. All decisions are included in the records designated to this Honorable Court.

JURISDICTION

The nature of this Petition is to challenge the validity of Judgment pursuant to the Labor Management

Reporting and Disclosure Act of 1959, 29 U.S.C. §401 et seq., commonly known as the employee bill of rights, §301 of the Labor Management Relations Act, 29 U.S.C. §185, et seq., as amended; the Employer Retirement Income Security Act (ERISA), 29 U.S.C. §1001, et seq. (Appendix, *Infra* pp. 28-33).

The Judgment sought to be reviewed is that of the Sixth Circuit Court of Appeals in *Gordon Panter* v. *American Synthetic Rubber Corporation, et al.*, 1988, (Circuit Court Number 87-5233/5839), entered April 25, 1988. (Appendix *infra* pp. 23-24). The decision of the trial court is not officially reported.

The Notice of Appeal was filed February 27, 1987.

The jurisdiction of the Supreme Court of the United States is conferred by Rule 19 of the Supreme Court of the United States and 28 U.S.C. §2101.

STATEMENT OF THE CASE

1. Petitions were employees of the Respondent Company and members of Respondents' Local Union prior to March 1, 1984. Still at issue is whether the Petitioners continued in their employment after that date. (Stipulation).

2. On or about March 1, 1981, the Respondent Company and Respondent, Local Union entered into an agreement whereby all bargaining unit employees of Respondent Company had unlimited recall rights. (Ex. p. 25).

3. The Petitioners have been on lay-off for varying lengths of time approaching three years as of the time of filing this action. (Stipulation #3).

4. Effective March 2, 1984, the Respondent Company and the Respondent Local Union entered into a new agreement. Under the terms of this new agreement, the Petitioners' seniority and recall rights were ended while those not on lay-off retained unlimited recall rights. (Stipulation #4).

5. Petitioners were not allowed to vote on the new agreement. (Stipulation #6).

6. Petitioners were not allowed to speak on behalf of their interests regarding the new agreement (Stipulation, Testimony Vol. 1, p. 14).

7. The Petitioners had been allowed to speak on behalf of their interests at union meetings up until the presentation of the 1984 agreement to the membership, an agreement which eliminated the seniority and recall rights of Petitioners. (Stipulation, Vol. 1, p. 114).

8. The Company and Union during negotiations prior to notification of the 1984 contract prepared and agreed upon lists of employees who would have unlimited recall rights and those who would have no recall rights under the terms of the 1984 agreement. The list of employees who retained unlimited seniority and recall rights were identical to those employees who were not allowed to vote on the new agreement. (Vol. 1, p. 21, p. 191, Stringfield Testimony, 110, 111, 112).

9. Respondent International Union concurred in the decision that the Petitioners had no right to vote on the new agreement. (Stipulation #7).

10. The first company proposal regarding seniority and recall rights would have applied to all employees of Respondent Company. This proposal was later changed so that it would discriminate and treat Petitioners different than other employees of Respondent Company. (Stringfield, Vol. 1, pp. 104-108, Schmidt, Vol. 1, p. 154).

11. The Petitioners herein, upon their layoff and subsequent to their layoff asked the Union leadership what they had to do to maintain their membership in Respondent Union. In each case, they were informed that they didn't have to do anything, and were told that the Union would take care of their membership. (Burns, Vol. 1, p. 191, Panter, Vol. 1, pp. 48, 49, Edrington, Vol. 1, pp. 81, 82, 85, Vincent, Vol. 1, p. 174, Wagers, Vol. 1, p. 187).

12. Mr. Stringfield, the Union President told Petitioners that they were no longer members of the Local Union in January, 1984. (Panter, Vol. 1, p. 41, Tedeschieci, Vol. 1, p. 71).

13. Petitioners were informed that they would not be allowed to vote or speak regarding the 1984 agreement on March 6, 1984.

14. In January, 1984, Mr. Stringfield told Petitioners that he was not sure whether he represented their interests. (Panter, Vol. 1, p. 46).

15. In late January, 1984, Mr. Stringfield informed Petitioners that he did not represent their interests. (Panter, Vol. 1, p. 47; Edrington, Vol. 1, p. 82; Vincent, Vol. 1, p. 183).

16. The Union leadership had taken a strike vote and were authorized by an overwhelming majority of the membership to call a strike during the 1984 negotiations. (Stringfield, Vol. 1, p. 183).

17. The Petitioners generally were not issued either dues exemption or honorary withdrawal cards. The cards were kept in a drawer at the Union hall.

18. The Company intended to hire new employees immediately upon the signing of the 1984 agreement. (Stringfield, Vol. 1, p. 119).

19. The offer was changed between the first offer and final offer to make it more attractive to the people in the plant, those who would vote on the agreement. (Stringfield, Vol. 1, p. 122).

20. Respondent Local Union and Respondent Company further negotiated a deadline to the Petitioners right to take their severance pay. (Stringfield, Vol. 1, pp. 128-132; Schmidt, Vol. 1, pp. 160, 161).

21. Subsequent to Petitioners being placed in a withdrawal status by the Union, the Union continued to treat them as Union members and represented them in grievance hearings. (Stringfield, Vol. 1, pp. 142, 143).

22. Company officials had heard rumors that the laid off employees would not be allowed to vote. (Schmidt, Vol. 1, pp. 157, 158).

23. At the time of the Petitioners' layoff, the treasurer of the local was Michael Dohoney. It was the job of the treasurer to issue Honorary Withdrawal Cards and Dues Exemption Cards. Mr. Dohoney testified that contrary to the minutes of the Union meeting which stated that he described the difference between the two cards (Respondents' Exhibit 1), he would not have explained the difference between the two cards because he did not understand the difference between the two cards. (Dohoney, Vol. 2, pp. 3, 4, 5).

24. In January, 1984, approximately two months prior to the conclusion of negotiations, Garnell Yarborough, the International Union Representative told Petitioners to take their severance pay and resign their jobs because they would not have jobs in March (1984) (Dohoney, Vol. 2, p. 6). At the time of the layoff of Petitioners, Dohoney did not have a copy of the Constitution of the International Union and was refused a copy when he asked for one. (Dohoney, Vol. 2, p. 15).

25. Mike Dohoney's testimony that while on a layoff and according to the theory of the Union, not a member, he was counted to make a quorum at union meetings and allowed to second motions (Dohoney, Vol. 2, pp. 112, 113) is unrefuted and in fact in some ways suggested by Mr. Stringfield's testimony (Stringfield, Vol. 2, p. 99). Mr. Dohoney also testified that he introduced measures and voted on issues at meetings until January, 1984. (Dohoney, Vol. 2, pp. 112, 113).

26. Petitioners have exhausted all administrative remedies. (Stringfield, Vol. 1, p. 113).

STATEMENT OF ORGINAL JURISDICTION

The Trial Court herein assumed Jurisdiction pursuant to 29 U.S.C. §401 et seq., 29 U.S.C. §185 et seq., and 29 U.S.C. §1001 et seq.; Pendent jurisdiction over State Law Claims.

ARGUMENT

Simply summarizing the facts in the case at hand, a situation is presented wherein the Respondent Company determined that it wanted to rid itself of certain employees who had been laid off from their employment for a period in excess of two years. Under Article VI of the collective bargaining agreement in effect from March 1, 1981, any employee who had greater than two years seniority with Respondent Company had unlimited recall rights from lay off. This provision had been in effect at least since 1959. Petitioners were members of the group who had been laid off from their employment for a period in excess of two years. Petitioners are members of Respondent International Union. Subsequent to their layoff, they had been accorded all privileges of union memberships including the right to speak on behalf of their interest. They generally were not allowed to vote at union meetings, although at least one individual, Mike Dohoney, was allowed to vote, introduce items for a vote, second treasurer's reports and other items.

Subsequent to layoff of Petitioners, they asked the Local Union President, Mr. Stringfield what they had to do to maintain their union membership privileges

and were regularly informed that they did not have to do anything, but that the Union would take care of everything for them.

In January, 1984, Mr. Stringfield met with the Petitioners and told them that the union did not represent their interest at the negotiating table. Mr. Stringfield told them that they were not union members. Mr. Stringfield informed Petitioners that the Company was going to demand the recall rights of Petitioners and that the Union was going to deny the Petitioners the right to vote on the agreement. Mr. Yarbrough, International Union Representative told Plaintiffs to take their severance pay from the company—this was said, in spite of the fact that two months of negotiations remained on the agreement.

In January, the Company and the Union met to trade proposals. The first Company proposal on the issue of seniority and recall rights would have eliminated the recall rights of all employees after one year layoff. In subsequent negotiating sessions, the Company and Union developed a system of total and complete discrimination. The Petitioners and others similary situated who were not allowed to vote were to be terminated, while those who would be allowed to vote on the agreement would retain unlimited recall rights. The Company and the Union then developed two lists. On one list were those employees who would be allowed to vote on the new agreement and who would retain unlimited recall rights. On the other list were the employees, including Petitioners, who would not be allowed to vote on the new agreement, and who

would be stripped of all their seniority and recall rights, rights earned by an average of over twenty years service.

With the above plan in effect, Mr. Stringfield denied the Petitioners and others similarly situated the rights to speak on behalf of their interest at the meeting where the contract was ratified. This was the first and only time that anyone similarly situated to Plaintiffs had been refused the right to speak on behalf of their interests at a Union meeting.

VIOLATIONS OF THE LAW

A. The actions of the Respondents/Appellees violate the rights of Petitioners/Appellants as established by the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 et seq., commonly known as the "Employee Bill of Rights."

Under the terms and conditions of this statute, the Petitioners must be granted a right to speak on behalf of their interests and vote on issues which affect them directly. *Alvey* v. *General Electric Company*, 622 F. 2d 1979 (7th Cir. 1980) in a case which is very nearly identical to the case before the Court. In that case, certain laid off employees were not permitted by their Union to vote on issues which directly affected their rights of recall and seniority rights. The Court in *Alvey, supra,* determined that the Union could refuse laid-off employees the right to vote or speak at Union meetings with the exception that they could not be refused the right to vote on issues which directly affect their interest. The Court then determined that changes

in the seniority and recall rights of individuals involved in that case directly affected their interest and ruled that they should have been allowed to vote thereon and speak on behalf of their interest pursuant to the Labor Management Reporting and Disclosure Act.

The defense of Respondent Local Union to this argument seems to be that Petitioners had been issued Honorary Withdrawal Cards under the terms of the Union Constitution and that according to the Constitution, the Petitioners were not entitled to vote on the labor agreement.

Under §101 et seq. of the Labor Management Reporting and Disclosure Act, and the ruling in *Alvey* v. *General Electric Co., supra,* the Petitioners were entitled to vote on the agreement and the Union's refusal of this right to vote constitutes a breach of law. See also *Christopher* v. *Safeway Stores, Inc.,* 103 LRRM 2017 (E.D. TX., 1979) in which the Court determined that the Union violated the Labor Management Reporting and Disclosure Act by changing seniority rights without allowing affected employees a right to vote thereon.

Any restriction on the voting rights of Petitioners must be reasonable. See *Johnson* v. *General Motors,* 641 F. 2d 1074 (2nd Cir., 1981); *Clayton* v. *U.A.W.,* 101 S. Ct. 1743, 20 L. Ed. 2d 763 (1968). Enforcement of the constitution against the Petitioners in the case herein is unreasonable. The transcript contains exhaustive testimony to the effect that Petitioners were misled by the Union leadership regarding their membership status. The Petitioners were informed by the

Local Union President, Mr. Max Stringfield, said that they did not have to do anything to maintain their membership, that the Union would take care of them. Mr. Dohoney, the union official who was charged with informing the Petitioners of the existence and explanation of a dues exemption card and honorable withdrawal card testified that he did not know the difference between the two types of cards. The cards were not distributed to the membership. The only evidence offered by Respondent Union to refute Petitioners' claim that they were not informed of the existence of a Dues Exemption Card were the minutes of a union meeting which stated that Mr. Dohoney informed the members of the difference between a dues exemption card and an honorable withdrawal card and Mr. Stringfield's testimony that he informed the membership at every meeting of the difference between the two cards. Mr. Dohoney directly refuted the minutes of the meeting, testifying that he could not explain the difference between the two cards he did not know the difference.

Mr. Sringfield's testimony stretches the bounds of believability first when he testified that he informed the membership at every meeting of the difference between two cards and second by his own subsequent testimony that no minutes exist of any meeting where he informed the membership of the difference between the two cards.

Mr. Stringfield himself seemed to be confused when confronted with the question of the voting rights of Petitioners. In January, 1984, he sought advice from the International Union regarding this question.

Finally, the best proof was how the Union treated these individuals. It is unrefuted in the record by any competent testimony that Mr. Dohoney, while holding an Honorable Withdrawal Card, was permitted to introduce measures to the membership for a vote, second motions, be counted toward a quorum and vote on issues before the Union. It is agreed by all that the Union represented these employees in grievance hearings and before government agencies, that they were permitted to attend Union meetings and to speak on behalf of their interest.

The only time that the questions of dues exemption cards and honorable withdrawal cards arose was two years after the layoff of Petitioners in January, 1984, when the Company decided to do away with the seniority and recall rights of the Petitioners. The Petitioners and others granted honorable withdrawal cards had always been permitted to speak at membership meetings with the only exception being that incident which was of most importance to the Petitioners that incident wherein they were prejudicially stripped of their seniority and recall rights while those individuals who were allowed to vote retained unlimited recall rights. The actions described herein, as well as the Union's refusal to allow Petitioners to vote on a Pension Agreement which affected the probability that Petitioners would be recalled, violates the rights of Petitioners as guaranteed by the Labor Management Reporting and Disclosure Act.

B. The Actions of Respondents violated the Rights guaranteed Petitioners/Appellants as guaranteed by §301 of the Labor Management Relations Act as amended.

Pursuant to § 301 of the Labor Management Relations Act of 1947, the Union owed a duty of fair representation to the Petitioners.

The Respondents in their bargaining, separated Petitioners and others similarly situated from the main body of employees, and wrote a separate contract clause covering the Petitioners. Petitioners who were not permitted to vote on the agreement had their seniority and recall rights revoked. Those individuals who were allowed to vote were specifically exempted from the provisions of the agreement whereby the Petitioners were terminated by the Company. In *Cannon* v. *Consolidated Freightways Corp.*, 524 F. 2d 290, 293, 99 LRRM 2996 (7th Cir., 1975), the Court states:

> "To prove arbitrary or discriminatory treatment, the Plaintiff must show that the union's conduct was intentional, inviduous and directed to that particular employee."

In the case before the Court, two distinct groups of employees existed at Respondent Company, those who were actively employed and those who had been laid off for over two years. The Company and the Union negotiated Article VI, Section 3(h) which states as follows:

> "3. Seniority shall be terminated for the following reasons:

(h) FAILURE OF AN EMPLOYEE ON LAY OFF STATUS TO BE RECALLED WITHIN TWO YEARS OF HIS DATE OF LAYOFF (EXAMPLE: EMPLOYEES ON LAYOFF STATUS AS OF 3/1/84, WHO WERE LAID OFF ON 3/1/82, SHALL BE TERMINATED EFFECTIVE 3/1/84). HOWEVER, THIS PARAGRAPH DOES NOT APPLY TO ANY EMPLOYEE ACTIVELY EMPLOYED OR WHO IS RECEIVING ACCIDENT & SICKNESS BENEFITS ON 3/2/84."

We are not discussing a contract clause which is applied equally to all, but is simply detrimental to one group of employees. The issue in this case is a contract clause which is *per se* discriminatory, a contract clause which, on its face, treats two groups of employees completely different.

The law regarding discrimination against members of the bargaining unit is so firmly established that the Court could almost take judicial notice that the actions of the Respondents herein are discriminatory and in violation of the law. The Supreme Court in *Steele* v. *Louisville & Nashville R. Co.,* 323 U.S. 192, 65 S. Ct. 226 89 L. Ed. 173 (1944). See also, *Vaca* v. *Sipes,* 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967).

See also *Boston Brands, Ltd.* v. *NLRB,* 529 F. 2d 793, 91 LRRM 2241 (7th Cir., 1976). In that case which involved the dovetailing of seniority the Court stated:

"[A union's] decision may not be made solely for the benefit of a stronger more politically favored

> group over a minority group. To allow such arbitrary decisions making is contrary to the union's duty of fair representation."

These actions of Respondents violate the rights of Petitioners as protected by §301 of the Labor Management Relations Act. The blatant discrimination against Petitioner is a violation of that act, and of the duty of the Union to properly represent the rights of the Petitioners in negotiations. Inasmuch as the agreement is in violation of the law, it is void and cannot be enforced to the detriment of the Petitioners.

C. The Seniority Rights of Petitioners/Appellants are Status Benefits Which Cannot be Eliminated Without the Apploval of the Petitioners/Appellants

The unlimited recall rights of Petitioners and others similarly situated have been in effect since at least 1959. In *U.A.W. v. Yard-Man, Incorporated,* 716, F. 2d 1476 (6th Cir., 1983) Cert. Denied 1045 S. Ct. 1002 (1984), the Sixth Circuit Classified certain benefits as "Status Benefits."

> "Further, retiree benefits are in a sense 'status benefits' which as such carry with them an inference that they continue so long as the prerequisite status is maintained. Thus, when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree." *Id.* at 1482.

In the instant case, certain seniority statuses were created by the agreement in effect between 1959 and 1983. First, under Article VI, Section 7, a laid off employee who has two years or less of seniority and who is recalled within five (5) years from the date of his layoff shall be given his previous seniority plus seniority credit for the time laid off provided such seniority does not exceed his actual seniority time at lay off.

The second paragraph of Article VI, Section 7, creates the second seniority status, the status attained by Petitioners-Appellants.

That paragraph states:

> "A laid off employee who had more than two years of seniority at the time of layoff and who is recalled at any time shall be given his previous seniority plus seniority for the time laid off provided such seniority does not exceed two years for any single period of layoff."

In *U.A.W. v. Yardman, Supra*, at 1479, the Court determined that:

> "Whether . . . benefits continue beyond the expiration of the colective bargaining agreement depends upon the intent of the parties. Clearly the collective bargaining agreement may provide for rights which will survive termination of their collective bargaining relationship . . . For instance, the Court shall first look to the explicit language for clear manifestations of intent." See also *International Union v. Malleable Iron Co., Inc.*, 135 CR 7 (6th Cir., 1984).

The 1981 Agreement under which Petitioners were laid off was effective March 1, 1981 and expired February 29, 1984. The contract was, therefore, a three-year agreement. The first seniority status herein covers a period of seven years, two years to obtain seniority and five years of recall rights. The second status cover an unlimited period, that being two years of seniority plus unlimited recall rights.

It is clear, therefore, from the language of Article VI, Section 7, that the seniority provisions of the agreement were intended to survive the three year agreement.

D. The Action of Respondents/Appellees in Severely Limiting Petitioners/Appellants' Severance Rights at the very time they became payable is a violation of the Employee Retirement Income Security Act (ERISA 29 U.S.C. §1001 et seq.

Respondent Company claims to have terminated Petitioners 3/1/84 at 11:59 p.m. according to an agreement with Respondent Union. This agreement only applied to Petitioners. (Exhibit "A" to More Definite Statement) During Petitioners' employment with Respondent Company, Petitioners accumulated a vested severance pay as provided by Article XVIII of the labor contract between Local 423 and A.S.R.C.

Employees were sent letters by Respondent Company notifying them of their termination and demanding that they request their severance pay. (Exhibit "C" to More Definite Statement). In Order to receive their severance pay, employees were forced to sign a

statement waiving all seniority and recall rights and removing their names from the seniority roster, and in effect, giving up their right to bring the lawsuit that is currently before the Court. (Exhibit "D" to more Definite Statement).

One of the Petitioners, J.J. Edrington requested severance pay, but refused to sign the company prepared document in his and instead prepared his own request. Said request was neither denied nor granted by the Respondent Company.

No individuals other than Petitioners and others who were subject to termination 3/1/84 had ever been required to sign a document or request their severance pay from Respondent Company. No individuals other than Petitioners have ever been given a deadline by Respondent company by which time they were required to request their severance pay.

Severance pay plans are subject of the provisions of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 et seq. See Department of Labor Regulations at 29 C.F.R. §2510.3-1(a). See also *Gilbert* v. *Burlingtons Industries*, 765 F. 2d 320 (2d Cir., 1985) and *Scott* v. *Gulf Oil Corp.*, 754 F. 2d 1499 (9th Cir., 1985).

The actions of Respondent Company were arbitrary and capricious and were an attempt to coerce and manipulate the Petitioners and others who were subject to termination 3/1/84 to sign away any claim to any legal action against Respondent Company and the Respondent Union regarding loss of seniority rights,

all of which is in violation of ERISA, 29 U.S.C. §1001, et seq., including but not limited to 29 U.S.C. §1140 and 20 U.S.C. §1141.

The case before the Court involves very simply the type of manipulation of benefits that ERISA was designed to protect against. Severance Pay Benefits were manipulated and strings were attached to the exact time that these benefits became payable.

The March 2, 1984 letter from William J. Mingus is an example of the Company's attempt to manipulate the system. The letter informs the employee that he was terminated from American Synthetic Rubber Corporation effective March 2, 1984. The Union ratification election on the contract in which Petitioners were terminated was not even held until March 6, 1984, four days after the letter was written. *At the time the letter was written terminating Petitioners, the Petitioners could not have been terminated. The Union still had an opportunity to reject the Company's contract proposal and strike for Petitioners' seniority and recall rghts.*

Employees requesting seniority pay immediately prior to March 2, 1984 were required to request severance pay and sign away their seniority and recall rights, in specific violation of the plan in effect at that time.

Denial of severance benefits to Mr. J.J. Edrington (Exhibit "B" to Response to Respondent American Synthetic Rubber Corporation's Motions to Dismiss) very clearly demonstrates the illegal intentions of the

Respondents. Mr. Edrington requested his severance pay in writing, stating only that he did not waive his rights under the contract or the law. The Company did not pay Mr. Edrington's severance pay.

The agreement entered into between the Company and the Union (Exhibit "C" to Respondent American Synthetic Rubber Corporations' Motion to Dismiss) requires that the employee request his severance pay in accordance with Article XVIII of the 1981 agreement. Article XVIII of the 1981 Agreement did not require that any written request be made by the employee.

The Petitioners have stated a prima facia violation of ERISA. Their claim is supported by the documentary evidence of record in this case. The Judgment of the Trial Court should be awarded to Petitioners.

CONCLUSION

For the reasons set forth herein, the Court shall hear the argument of Petitioners that the Judgment of the Trial Court must be set aside and the Judgment must be awarded to the Petitioners herein or, in the alternative, the case must be remanded to the Trial Court for a trial by jury.

Respectfully submitted,

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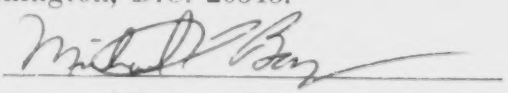
Attorney for Petitioners

CERTIFICATION

It is hereby certified that a copy of the foregoing Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals was mailed this 22nd day of June, 1988, to Hon. C. Laurence Woods, III, 501 South Second Street, Louisville, Kentucky 40202, to the Hon. John Frith Stewart, 300 Marion E. Taylor Bldg., Louisville, Kentucky 40202, and to Mr. Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543.



MICHAEL L. BOYLAN

APPENDIX

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

No. 87-5233/5839

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GORDON PANTER, et al., - - - *Plaintiffs-Appellants,*

v.

AMERICAN SYNTHETIC RUBBER CO., et al., - - - - - - Defendants-Appellees.

On Appeal from the United States District Court For the Western District of Kentucky

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Decided and Filed April 25, 1988

BEFORE: KRUPANSKY and WELLFORD, Circuit Judges; and GILMORE,* District Judge

PER CURIAM. Plaintiffs-appellants Gordon Panter and nine other former employees of American Synthetic Rubber Corp. (ASCR), all of whom were also former members of the United Rubber, Cork, Linoleum and Plastic Workers of America International Union and its affiliate Local 423 (the Unions), have appealed from the district court's grant of summary judgment for defendants ASRC and the Unions on all issues in this action alleging violations of the Labor Management Relations Act, 29 U.S.C. § 185 (the LMRA), the Labor Management Reporting and Disclosure

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*Hon. Horace Gilmore, United States District Judge, Eastern District of Michigan, sitting by designation.

Act, 29 U.S.C. § 401 (LMBDA), the Kentucky Age Discrimination statute, and ERISA.

Upon consideration of the entire record, the briefs filed by the respective parties, and the contentions raised at oral argument, this court AFFIRMS the decision of the district court for the reasins stated by Judge Allen in his Memorandum Opinions of December 17, 1984, November 1, 1985, May 1. 1986 and September 5, 1986.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 84-0293-L(A)

GORDON PANTER, et al., - - - - - *Plaintiffs,*

v.

AMERICAN SYNTHETIC RUBBER CORPORATION, et al., - - - - *Defendants.*

MEMORANDUM OPINION AND ORDER

This action is before the Court on Defendant's American Synthetic Rubber Corporation, motion for summary judgment on the ground that Plaintiff Edrington failed to exhaust his contractual remedies, and Plaintiff's motion to set aside the judgment entered in this case an September 5, 1986, dismissing all claims against Defendants with the exception of Edrington's claim against ASRC for severance pay. The Court will discuss Plaintiff's motion first.

Plaintiffs' complaint alleges that Defendants violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* by denying their claims to severance pay. In March 1984 Defendant ASRC and Defendant United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 423 ("Union"), which is affiliated with Defendant United Rubber, Cork, Linoleum and Plastic Workers of America, International Union, AFL-CIO, CLC, negotiated a new collective bargaining agreement. Under that agreement, all employees who had been laid-off for more than two years lost their right to recall. Under the

former agreement, laid-off employees with two or more years of seniority retained recall rights no matter how long they had been on layoff unless they requested and received severance pay. Under the new agreement Union members would have forty-eight hours after the new contract was ratified in which to request severance pay.

J.J. Edrington was the only plaintiff in the instant case who requested severance pay. Both the new contract and the old contract provided that employees who decided to take severance pay would lose their seniority and recall rights upon receipt of the severance pay.

The Court rejected Plaintiff's contention that Defendant violated ERISA. Under *Sutton* v. *Weirton Steel*, 724 F. 2d 406 (4th Cir. 1983), employees' rights to severance pay may be modified without violating ERISA and must be governed by employment agreements. The Court, therefore, held that the right to severance pay was subject to negotiation between the Union and the ASRC and refused to interfere with that agreement. The Court dismissed all claims against the Unions and all claims against ASRC, with the exception of Edrington's.

The Court will sustain its September 5, 1986, order. Plaintiffs did not pay Union dues or seek dues exemptions while on layoff and therefore forfeited their Union membership and lost their rights to participate in the ratification vote of the contract. Further, the Union gave Plaintiffs advance notice that they would not be allowed to participate in the ratification vote and advised the Plaintiffs to obtain an attorney to represent their interests.

Next, ASRC's motion for summary judgment on the ground that Edrington failed to exhaust his administrative remedies under the collective bargaining agreement will be granted. Edrington claims that ASRC has failed to pay his severance pay in violation of the new contract. Edring-

ton, however, did not make use of the grievance and procedures provided in Article V of that agreement, which culminates in arbitration. Edrington's claim is based upon a breach of the collective bargaining agreement and he is bound by the terms of that agreement as it governs the manner in which contractual rights may be enforced.

Althoug Edrington argues that ASRC's motion should be denied because it would have been futile for him to have pursued his contractual remedies and that he should, therefore, be excused from doing so, the courts insist upon a clear showing of futility before excusing a failure to exhaust. *Miller* v. *Chrysler Corp.*, 748 F. 2d 323 (6th Cir. 1984). In the instant case, the Union's president negotiated for Plaintiff's rights to apply for severance pay and there is no indication that the Union would have been hostile toward Edrington's grievance.

Accordingly,

It Is Ordered that Plaintiffs' motion to set aside the Court's September 5, 1986 order be, and it hereby is, denied.

It Is Further Ordered that Defendant ASRC's motion for summary judgment be, and it hereby is, granted.

It Is Further Ordered that Plaintiff J.J. Edrington's complaint against ASRC be, and it hereby is, dismissed with prejudice.

This is a final and appealable order and there is no just cause for delay.

Dated _____

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

§ 185. Suits By and Against Labor Organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting comerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

§ 401. Congressional declaration of findings, purposes, and policy

(a) Standards for labor-management relations

The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Natiou; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

(b) Protection of rights of employees and public

The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) Necessity to eliminate or prevent improper practices

The Congress, therefore, further finds and declares that the enactment of this chapter is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended [29 U.S.C.A. § 141 et seq.], and the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.], and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce.

§ 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate comerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to ade-

quate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanc-, tions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to meet minimum standards of funding, and by requiring plans termination insurance.

§ 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

§ 1141. Coercive interference

It shall be unlawful for any person through the use of fraud, force, violence, or threat of the use of force or violence, to restrain, coerce, intimidate, or attempt to restrain, coerce, or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under the plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.]. Any person who willfully violates this section shall be fined $10,000 or imprisoned for not more than one year, or both.